No. 84-1789

Office - Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOSEPH E. SIMON and
MARGARET E. SIMON,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDICES C AND D

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22 pp.

APPENDIX C

FILED
SEPTEMBER 29, 1983

THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH E. SIMON and MARGARET E. SIMON, Plaintiffs, v. CITY OF LOS ANGELES, Defendant.	NO. CV 82-3338 RG ORDER

The Court, having read and considered the defendant's Motion for Summary Judgment, and having heard oral argument thereon, and other good cause therefor appearing, it is

ORDERED that defendant's Motion for Summary Judgment is granted. The Court's reasons for its decision are set forth in the accompanying Memorandum Opinion. The Memorandum Opinion shall constitute the

Court's Findings of Fact and Conclusions of law in this case.

RICHARD A. GADBOIS, JR.
United States
District Judge

APPENDIX D

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH E. SIMON and MARGARET E. SIMON, Plaintiffs, v. CITY OF LOS ANGELES, Defendant.	NO. CV 82-3338 RG FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiffs Joseph Simon and Margaret E. Simon are the record owners of the property which is the subject of this litigation.

2. Defendant City of Los Angeles ("City") is a chartered municipal corporation, existing under and by virtue of the laws of the State of California.

3. The property which is the subject of this litigation is in the Westchester-

> is, of course, no contention in this case that the existing zoning classification renders respondent's property valueless or otherwise diminishes its value below the value when respondent acquired it." City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n. 8; 96 S.Ct. 2358 (1976).

Regulations are upheld which allow some reasonable use, although often at a significantly reduced level of speculative profit. In Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 57 L.Ed.2d 631 (1978), regulations were upheld which resulted in substantial loss of income from the denial of a right to build a 55-story office building in midtown Manhattan. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) regulations were upheld which resulted in a 75% diminution of value, and in Hadacheck

v. Sebastian, 239 U.S. 394 (1915) regulations were upheld which resulted in a 87.5% reduction in value.

Most recently, this Court considered the "taking" claim of a company whose property interest in its pesticide trade secrets was reduced in value by public disclosure of data submitted to a federal agency. In Ruckelshaus v. Monsanto Co., ___ U.S. ___, 104 S.Ct. 2862 (1984), this Court held that to the extent state law recognized a property right in trade secrets, that right "is protected by the Taking Clause of the Fifth Amendment." 104 S.Ct. at 2874. This Court went on to consider at what point a governmental action goes beyond regulation and effects a "taking" of property. Of the factors

considered, this Court focused on the interference of the regulation with the owner's reasonable investment-backed expectations.

> "A 'reasonable investment backed expectation' must be more than a 'unilateral expection or an abstract need.'" 104 S.Ct. at 2875.

This Court held that under a federal regulatory scheme that expressly authorized disclosure of data, Monsanto lacked a "reasonable investment-backed expectation" of confidentiality of its data.

Furey v. City of Sacramento, 592 F.Supp. 463 (E.D. Cal. 1984) holds that summary judgment is appropriate against property owners claiming a "taking" from, among other things, a city's failure to upzone their

property. In applying the "investment backed expectation" test as discussed in Ruckelshaus, supra, to the facts before it, the Furey court said:

> "A property owner cannot, by voluntarily preparing his property for intensive development, circumscribe the city's power and authority to legislate in the public interest.
>
> * * *
>
> "To the extent that the private interest is in the maximum exploitation of a piece of property, it is entitled to no weight whatsoever." 592 F.Supp. at 470-471. Emphasis added.

The Furey decision expressly relies on and is wholly consistent with the test enunciated by this Court in Agins and Ruckelshaus.

In the instant case, the property owners do not have a reasonable expectation that zoning will remain unchanged on their property. Zoning may change as conditions change.

> ". . . [i]t has long been settled law in California that a landowner has no vested right in a particular zoning classification. 592 F.Supp. at 470.

Moreover, a municipality may deny a development right to one property owner based on the facts unique to that parcel.

> "Municipalities must retain the authority to modify their policies with respect to community development, without having the burden of demonstrating that the consequences of change fall evenly upon interested parties. A contrary rule would prevent local government from reacting to changed conditions or from

> implementing alterations in municipal priorities. The unreasonablesness of such a rule is apparent on its face. City of Highland Park v. Train, 374 F.Supp. 758, 773 (N.D. Ill. 1974).

The ordinance in dispute here results in a disappointment to petitioners' hope of maximum exploitation of their property for development of ten condominium units. That expectation was backed by an investment in commercially zoned property more than twenty years earlier (AR Tab 5 Declarations of J. Simon and M. Simon at 1) and used for commercial purposes until abandonment of use in recent years. AR Tab 13C at 226. That preexisting commercial zoning (as opposed to a preexisting use) would remain evermore or at least until a maximum profit had been turned is demonstrably not a reasonable expectation.

As this Court enunciated in Agins:

> "Although the ordinances limit development, they neither prevent the best use of appellants' land, (citation omitted) nor extinguish a fundamental attribute of ownership (citation omitted). . . . At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments."
> 447 U.S. at 262-263.

By any measure of a "taking" - reasonable economic use, extinguishment of an attribute of ownership, reasonableness of investment-backed expectations - no "taking" has occurred.

C. The "Substantial Advancement of Legitimate State Interests" Prong of the Agins Test

Petitioners are petitioning for an opportunity to present evidence in court of a more appropriate zone than RD2-1 on their property. Petition at 44. They had the opportunity (AR Tab 13 A & B) to persuade the City that a higher (10 units) rather than a lower (6 units) density was appropriate for the property. The hearing examiner recommended to reduce densities at the subject site to a small degree and use it as a buffer. (AR Tab 13C.) It is the City Planning Commission and the City Council, in reliance on planning staff advice, who are the appropriate agencies to make the policy choice between several zoning alternatives.

> "States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. (Citations omitted.)
>
> "Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 101 S.Ct. 715, 724 (1981). Emphasis added.

As this Court decided in a zoning case almost 60 years ago, a zoning ordinance may not be set aside if a rational basis can be found from the purposes articulated in the

legislation itself. Village of Euclid v. Ambler Realty Co., supra, 272 U.S. at 395.

The evidence before the City herein included the fact that petitioners' property is surrounded by single family dwellings to the north and east and adjacent to commerical on the south and across the street. AR Tab 13 at 223. That the area is appropriate for restricted multiple residential use is evidenced by the fact, among others, that petitioners themselves seek to use their property for multiple residential condominium purposes. AR Tab 5 at 1-2.

The Westchester-Playa del Rey District Plan (Tab 13D) designated more restrictive densities such as R-1 than the recommended RD2-1 for the

site. However, it was the City Council's judgment that a six-unit condominium development would better serve as a transition-buffer use between the gas station on the south and single family dwellings on the north rather than a single family dwelling directly abutting a gas station. AR Tab 3 Affidavit at 5. The lower density would reduce the traffic and parking burdens generated by development, impacting neighbors who raised such issues in the hearing process before the City. AR Tab 13C at 225. As the hearing examiner concluded:

> "The RD2-1 Zone would permit residential densities more compatible with the adjacent single-family residential development." AR Tab 13C at 220.

It is that recommendation and legislative reliance thereon with which petitioners quarrel. However, once it is established that the City's zoning action is supported by rational and legitimate grounds, it is entirely irrelevant that petitioners would prefer, or even that they could justify, another zoning action.

> "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing [urban land use] conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." Gorieb v. Fox, 274 U.S. 603, 608 (1927).

The courts will even go beyond the face of the legislative record to hypothesize the motivations of the . . . [local] legislature to find a legitimate objective. . . ." Malmed v. Thornburgn, 621 F.2d 656, 569 (3rd Cir. 1980) cert. denied, 449 U.S. 955 (1980). Here both the District Court and the Court of Appeals found that legitimate planning and environmental grounds were articulated and supported in the record. Appendix A-7-8 and D-14-15. Those courts were satisfied that the grounds (buffer zoning, consistency with the General Plan and reduction of parking and traffic impacts on they neighborhood) applied uniquely to petitioners' property and justified the zoning ordinance. Appendix A-7.

Since the courts below fully reviewed the relevant facts and properly applied applicable precedent to the federal question herein, there is no ground under Rule 17 of the Rules of the Supreme Court for this Court to review further the record in this matter.

CONCLUSION

For the foregoing reasons, the City respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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